Supreme Court, U.S.
FILED

01 968 DEC 10 2001

OFFICE OF THE CLERK

No. 01-

IN THE

# Supreme Court of the United States

NATIONAL ASSOCIATION OF
STATE UTILITY CONSUMER
ADVOCATES,

*Petitioner*,

v.

FEDERAL COMMUNICATIONS
COMMISSION AND THE UNITED
STATES OF AMERICA,

*Respondents*.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

## PETITION FOR WRIT OF CERTIORARI

GLENN B. MANISHIN
STEPHANIE A. JOYCE
Kelley, Drye & Warren
1200 19th Street, N.W.
Washington, D.C. 20036
(202) 955-9600
*Of Counsel*

MICHAEL J. TRAVIESO*
MARYLAND PEOPLE'S COUNSEL
6 St. Paul Street, Suite 2102
Baltimore, MD 21201
(410) 767-8150

*Counsel for Petitioner*

December 10, 2001

*Counsel of Record

132pp

## QUESTION PRESENTED

1. Whether the court of appeals' decision upholding the mandatory recovery of all interstate costs associated with shared telephone "loop" facilities from consumers of local exchange service contravenes the plain language of § 254(k) of the Telecommunications Act of 1996, 47 U.S.C. § 254(k), which requires the Federal Communications Commission and corresponding state agencies to establish cost "allocation" rules that ensure that any "universal service" does not "bear . . . more than a reasonable share of the joint and common costs of the facilities used to provide" the service.

## LIST OF PARTIES AND AFFILIATES

Pursuant to Supreme Court Rule 29.6, Petitioner states as follows:

The National Association of State Utility Consumer Advocates (NASUCA) is an association of 43 consumer advocate offices in 40 states and the District of Columbia. NASUCA members, most as required by state law, represent the interests of consumers of regulated telecommunications, energy and other services before state and federal regulators and in the courts. NASUCA was a party in the proceedings below before the Federal Communications Commission (FCC) and was a petitioner in the court of appeals. The Texas Office of Public Utility Counsel, US West Communications, Inc. and Pathfinder Communications, Inc. were also petitioners in the court of appeals. The FCC and the United States were respondents. The Consumer Federation of America, AT&T Corp. and the Coalition for Affordable Local and Long Distance Service (CALLS) were intervenors in the court of appeals. The members of CALLS are AT&T Corp., BellSouth Corp., SBC Corp., Sprint Corp. and Verizon Telephone Companies.

## TABLE OF CONTENTS


Page

QUESTIONS PRESENTED ..... i

LIST OF PARTIES AND AFFILIATES ..... ii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

SUMMARY OF ARGUMENT ..... 12

REASONS FOR ISSUING THE WRIT ..... 13

I. THE DECISION BELOW CONTRADICTS THE PLAIN MEANING OF § 254(k) ..... 14

A. The Court of Appeals Was Obligated to Implement the Clear "Reasonable Share Language of § 254(k) ..... 14

B. The Court of Appeals' Interpretation of Cost "Allocation" Contradicts the Settled Treatment of Cost Allocation and Recovery in Telecommunications Regulation ..... 16

**Page**

II. THE COURT OF APPEALS' DECISION CREATES AN UNNECESSARY CONFLICT BETWEEN STATE AND FEDERAL AGENCY INTERPRETATIONS OF A STATUTE EQUALLY APPLICABLE TO BOTH JURISDICTIONS .....23

CONCLUSION .....29

## TABLE OF AUTHORITIES

**Page**

**CASES**

*AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) ..... 2, 5

*Caminetti v. United States*, 242 U.S. 470 (1917) ..... 15 n.15

*Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) ..... 15 & n.17

*Citizens' Utility Ratepayer Bd. v. Kan. State Corp. Commission*, 24 Kan. App. 222, 943 P.2d 49 (Kan. Ct. App.), *rev'd in part on other grounds*, 264 Kan. 363, 956 P.2d 685 (1998) ..... 28 n.23

*Colorado Office of Consumer Counsel v. PUC of Colorado*, 786 P.2d 1086 (Colo. 1990) ..... 23 n.20

*INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) ..... 15 n.16

*Iowa Utils. Bd. v. FCC*, 525 U.S. 366 (1999) ..... 12 n.11, 13

*MCI Telecomm. Corp. v. FCC*, 675 F.2d 408 (D.C. Cir. 1982) ..... 5

*National Ass'n of Regulatory Utility Commissioners v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985) ..... 19

*Packard Motor Car Co. v. Nat'l Labor Rel. Bd.*, 330 U.S. 488 (1947) ..... 14, 16

*PUC of Texas v. AT&T Communications of the Southwest*, 777 S.W.2d 363 (Tex. 1989)..... 23 n.20

*Qwest Corporation v. FCC*, 258 F.3d 1191 (10th Cir. 2001) ..... 27

*Smith v. Illinois Bell Tel. Co*, 282 U.S. 133 (1930) ..... 6, 21

*Southwestern Bell Tel. Co. v. Arkansas PSC*, 946 S.W.2d 730 (Ark. 1997) ..... 23 n.20

*Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998) ..... 7 n.5, 10, 19, 20

*Teleconnect v. Iowa State Commerce Comm.*, 404 N.W.2d 158 (Iowa 1987) ..... 23 n.20

*United States v. Sullivan*, 332 U.S. 689 (1948) ..... 15 n. 15

*United States v. Wiltberger*, 18 U.S. 76 (1920)..... 15

*United States Tel. Assn. v. FCC*, 188 F.3d 521 (D.C. Cir. 1999) ..... 10 n.10

*US West Communications, Inc. v. Washington Utilities and Transportation Commission*, 949 P.2d 1337 (Wash. 1997) .....23 n. 20

*Verizon Communications, Inc. v. FCC, cert. granted,* __ U.S. __, 121 S. Ct. 2548 (2001) .....12 n.11

## STATUTES

Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (West Supp. 1998) (1996 Act) ..... 2

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 2342 ..... 11

47 U.S.C. § 254(b) ..... 2 & n.1

47 U.S.C. § 254(f) ..... 27 n.22

47 U.S.C. § 254(k) ..... *passim*

47 U.S.C. § 402(a) ..... 11

## LEGISLATIVE MATERIALS

H.R. Rep. No. 204, 104th Cong., 1st Sess. (1995) ..... 4

CONFERENCE REPORT, JOINT EXPLANATORY STATEMENT OF THE COMMITTEE, S. 652, THE TELECOMMUNICATIONS ACT OF 1996, 104th Cong., 2nd Sess. (1996) ..... 21

REPORT OF THE SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION ON S. 652, TELECOMMUNICATIONS AND DEREGULATION ACT OF 1995, 104th Cong., 1st Sess. (1995) ..... 22

**ADMINISTRATIVE DECISIONS**

*Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982, 62 Fed. Reg. 31,040 (1997), *aff'd, Southwestern Bell Tel. Co. v. FCC,* 153 F.3d 523 (8th Cir. 1998) ..... 6 n.4, 7, 8 n.6

*Access Charge Reform, Price Cap Performance Review For Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket 99-249, Eleventh Report and Order in CC Docket No. 96-45,15 FCC Rcd. 12,962, 65 Fed. Reg. 38,683 (2000) (*CALLS Order*)..... *passim*

*Federal-State Joint Board on Universal Service,*12 FCC Rcd. 8776, 62 Fed. Reg. 32,862 (1999) *aff'd pertinent part, Texas Office of Pub. Util. Counsel v. FCC,* 183 F.3d 393 (5th Cir. 1999), *cert. granted,* 120 S. Ct. 2214, *cert dismissed,* 121 S. Ct. 423 (2000) ..... 18

*Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* 11 FCC Rcd. 15,499, 62 Fed. Reg. 45,476, *vacated in part, Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366 (1999), *vacated in part on remand sub nom. Iowa Utils. Bd. v. FCC,* 219 F.3d 744 (8th Cir. 2000) ..... 5

*Implementation of Section 254 of the Communications Act of 1934, as amended*, 12 FCC Rcd. 6415, 62 Fed. Reg. 45,587 (1997) ..... 5

*In the Matter of the Filing of Southwestern Bell Tel. Co.*, 26 Mo. PSC (NS) 344 (Mo. Pub. Svc. Comm'n 1983) ..... 23 n.20

*In the Matter of Determining Costs for Universal Service*, Docket No. UT-980311(a), 1998 Wash UTC Lexis 443 (1998) ..... 27

*Jurisdictional Separations Reform and Referral to the Federal-State Joint Board*, Notice of Proposed Rulemaking, CC Docket No. 80-286, FCC 97-354 (rel. Nov. 10, 1997) ..... 5

*MTS and WATS Market Structure*, Joint Board Recommended Decision, 2 FCC Rcd. 2324, 52 Fed. Reg. 19,896 (1987) ..... 6 n.4

*MTS and WATS Market Structure*, Report and Order, 2 FCC Rcd. 2953, 52 Fed. Reg. 21,536 (1987) ..... 6 n.4

*MTS and WATS Market Structure*, Memorandum and Order On Reconsideration, 3 FCC Rcd. 4543 (1988) ..... 6 n.4

*New England Telephone Generic Rate Structure Investigation*, 76 NH PUC 150 (New Hampshire Pub. Utils. Comm'n 1991) ..... 23 n.20

*Re Access Charge Reform and Universal Service Reform,* Cause No. 40785, 1998 Indiana Lexis, PUR 4th (slip op. Oct. 28, 1998), *aff'd on rehearing sub nom. Re Universal Service Reform,* 1999 WL 236863 (Ind. R.U.C. 1999) ..... 24

*Re Competitive Telecommunications Environment,* Decision No. 98-46, 1998 WL 983449 (Col. Pub. Utils. Comm'n 1998) ..... 26 n.21

*Re Costing and Pricing of Unbundled Network Elements, Transport and Termination,* Thirteenth Supplemental Order, 207 PUR4th 379 (Wash. U.T.C. 2001) ..... 26

*Re Govern Open Access to Bottleneck Services,* R93-04-003, 93-04-002, Decision 01-08011, California Lexis, PUR 4th (California PUC slip op. 2001) ..... 26 n.21

*Re GTE North Incorporated,* Case No. U-11832, Michigan Lexis, PUR 4th (Mich. Pub. Svc. Comm'n slip op. 2000) ..... 26 n.21

*Re Investigation Into Non-traffic Sensitive Cost Recovery,* 89 PUR 4th 258 (Fla. Pub. Svc. Comm'n 1987) ..... 23 n.20

*Re Standards and Safeguards For Competitive Services,* M-009 40587, 1996 WL 944339 (Pa. Pub. Util. Comm'n 1996) ..... 26 n.21

*Re US West Communications, Inc.,* Docket No. RPU-96-9, 1998 WL 265370 (Iowa Utils. Bd. 1998) .... 26 n.21

*Re US West Communications, Inc.*, 183 PUR 4th 382 (Utah Pub. Svc. Comm'n 1997) ..... 26 n.21

**ADMINISTRATIVE RULES**

47 C.F.R. § 36.154 ..... 5

47 C.F.R. § 54.101 ..... 2 n.1, 9

**OTHER MATERIALS**

JAMES C. BONBRIGHT, *et al.*, PRINCIPLES OF PUBLIC UTILITY RATES (2d ed. 1988) ..... 17

CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES (3rd ed. 1993) ..... 17

MICHAEL K. KELLOGG, JOHN THORNE & PETER W. HUBER, FEDERAL TELECOMMUNICATIONS LAW (1992) ..... 5, 6

No. 01-___

IN THE

# Supreme Court of the United States

---

NATIONAL ASSOCIATION OF
STATE UTILITY CONSUMER
ADVOCATES,

*Petitioner*,

v.

FEDERAL COMMUNICATIONS
COMMISSION AND THE UNITED
STATES OF AMERICA,

*Respondents*.

---

On Petitions for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

---

## PETITION FOR WRIT OF CERTIORARI

---

The National Association of State Utility Consumer Advocates (NASUCA) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals, reproduced in the Appendix to this Petition (App.) at 1a-27a, is reported at 265 F.3d 313 (5th Cir. 2001). The order of the FCC, *Access Charge Reform, Price Cap Performance Review For Local Exchange Carriers, Low-Volume Long-Distance Users, Federal-State Joint Board on Universal Service,* Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket 99-249, Eleventh Report and Order in

CC Docket Nos. 96-45, is reported at 15 FCC Rcd. 12,962 (2000) (App. 28a-85a). The FCC order is commonly referred to as the "*CALLS Order*" because the *ad hoc* group of carriers proposing the rules adopted by the FCC below was called the Coalition for Affordable Local and Long Distance Service.

## JURISDICTION

The judgment of the court of appeals was entered on September 10, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant portions of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, appear at App. 86a-88a.

## STATEMENT OF THE CASE

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. § 251 *et. seq.* (West Supp. 1998) (1996 Act), sought to bring competition to the local exchange telecommunications market, to enhance competition in the long-distance market and to assure that universal telephone service would be "preserved and advanced" for all Americans at rates which are just, reasonable and affordable.[1] *See generally AT&T Corp. v. Iowa Utils. Board,* 525

---

[1] *E.g.*, 47 U.S.C. § 254(b). The FCC has defined "universal service" under Section 254 to include voice grade access to the public switched network; local usage; dial-tone multi-frequency signaling; single party service; access to emergency services; access to operator services; access to interexchange service; access to directory assistance; and toll limitation for qualifying low-income customers. 47 C.F.R. § 54.101. All of these are services to consumers, not to carriers. *See* 47 U.S.C. § 254(b). For

*footnote continued on next page*

U.S. 366 (1999); 47 U.S.C. § 254(b). As part of the mechanism to ensure that rates for "universal service" remain just and reasonable, Congress enacted § 254(k), the second sentence of which provides that:

> The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear *no more than a reasonable share of the joint and common costs of facilities used to provide those services.*

47 U.S.C. § 254(k) (emphasis supplied).

This case concerns the refusal of the FCC and the court of appeals to give any effect whatsoever to the "reasonable share" language of § 254(k). By failing to allocate any of the joint and common costs of the shared telephone network facility on which all local and long-distance calls are carried — known as the "local loop" — to interstate carrier access service, the FCC has increased universal service rates for millions of residential consumers. In the *CALLS Order* the FCC restructured the rates charged by the four largest local exchange carriers (LECs)[2] by eliminating a charge to long-distance carriers, called the Primary Interexchange Carrier Charge (PICC), and increasing a charge to consumers, known as the subscriber line charge (SLC), to make up the resulting difference in LEC revenues. The FCC raised the

---

example, long-distance carrier access to a local exchange carrier in order for a long-distance carrier to originate and terminate its calls is not included in the definition of universal service.

[2] These four incumbent LECs, Verizon, Qwest, SBC and BellSouth, serve approximately 85% of all of the residential local service customers in the United States.

cap on the SLC charge from $3.50 per primary line to $6.50 per line. Every residential customer of the four CALLS coalition LECs has already seen this rate increase from $3.50 to $5.00. Further increases are scheduled for July 1, 2002 to $6.00 and for July 1, 2003 to $6.50.[3]

In the *CALLS Order,* the FCC determined for the first time that the SLC rate, paid by consumers of basic local telephone services, would recover 100% of the interstate cost of the local loop. In order to evaluate this decision against the legal standard established in § 254(k), a brief explanation of the regulatory rules traditionally applied to cost allocation and cost recovery for consumer and carrier access to the telephone network is necessary.

The public switched telephone network is a system of interconnected facilities that allows telephone subscribers to make and receive local and long-distance telephone calls and other services. Prior to the passage of the 1996 Act and after the breakup of AT&T, the Regional Bell Operating Companies and other LECs continued to provide monopoly local exchange services, including both access and usage, while long-distance companies, called interexchange carriers (IXCs), provided competitive long-distance usage service. *See* H.R. Rep. No. 204, 104th Cong., 1st Sess. 48-50 (1995). LECs provided, and continue to provide, interstate interexchange *access* service, as distinguished from interstate interexchange *usage*, which is offered by IXCs. Local exchange companies also provide intrastate interexchange access, as well as intrastate interexchange usage in competition with IXCs. *See CALLS Order* ¶ 18 (App. 39a).

---

[3] The FCC is currently conducting a cost review proceeding to determine if these two scheduled increases are cost justified. However, that proceeding will not address the cost allocation issues decided by the court of appeals and presented in this petition.

The local loop is the key portion of the telephone network for the provision of all local and long-distance services, both interstate and intrastate. Local access and usage and interexchange access and usage are all provided over a shared facility (generally a pair of twisted copper wires) which connects a central office, used to switch telephone traffic, to a consumer's premise. This shared twisted-pair facility is the local loop. LECs' costs of providing loops are not traffic-sensitive, *i.e.*, they are the same regardless of volume, because these costs do not vary with usage. A loop is needed for one call or many. MICHAEL K. KELLOGG, JOHN THORNE & PETER W. HUBER, FEDERAL TELECOMMUNICATIONS LAW, § 9.3.2 at 436 n.22 (1992) (loop cost "remains the same whether the subscriber or 'end user' uses the loop to make one call or a hundred, and whether those calls are local or long distance").

Because the loop is a shared facility, loop costs are joint and common costs in that virtually all the services provided to consumers by LECs and IXCs must use the loop as the vehicle for access to the network. The FCC has affirmed this principle on numerous occasions. For example, in *Jurisdictional Separations Reform and Referral to the Federal State Joint Board,* Notice of Proposed Rulemaking, FCC 97-354 (rel. Nov. 10, 1997), the FCC emphasized that "the cost of a residential loop is common to local, intrastate toll and interstate toll services." Likewise, "the costs of local loops ... are common with respect to interstate access service and local exchange service." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15,499, *vacated on other grounds in part, Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), *vacated in part on remand sub nom. Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000). *See* 47 C.F.R. § 36.154; *Implementation of Section 254 of the Communica-*

*tions Act of 1934, as amended,* 12 FCC Rcd. 6,415, 6,420 (1997). *See CALLS Order* ¶ 5 (App. 31a).

Although the ratemaking method can sometimes vary, regulated telecommunications carriers are generally permitted to recover their costs plus a reasonable return. Rates for specific services are set based on the direct costs of each service and some allocation of the company's common costs — corporate overhead, jointly used facilities, etc. *MCI Telecomm. Corp. v. FCC*, 675 F.2d 408, 410 (D.C. Cir. 1982) (upholding "fully distributed cost" method of allocating common costs); FEDERAL TELECOM. LAW, § 9.3.4 at 437. Because the loop is a facility used to provide both intrastate and interstate services, the costs of the network are also divided "jurisdictionally" between the FCC and state regulatory commissions for purposes of ratemaking. *Smith v. Illinois Bell Tel Co.*, 282 U.S. 133 (1930). FCC-approved rates for interstate services are designed to recover 25% of the costs of the local loop. Local exchange carriers recover the remainder of their loop costs in intrastate rates set by the state commissions *CALLS Order* ¶ 11 (App. 34a-35a).

Traditionally, the FCC has set rates to permit LECs to recover significant interstate loop costs from both carriers (IXCs) and from end users (consumers).[4] Prior to 1997, the

---

[4] Loop cost recovery was originally split about evenly between IXCs and customers. *MTS and WATS Market Structure, Joint Board Recommended Decision*, 2 FCC Rcd. 2,324 ¶ 49 (1987); *MTS and WATS Market Structure*, Report and Order, 2 FCC Rcd. 2,953 (1987); *MTS and WATS Market Structure*, Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd. 4543 (1988). In its first decision on access charges after passage of the 1996 Act, *Access Charge Reform*, First Report and Order, 12 FCC Rcd. 15982 *(Access Reform First Order)*, the FCC found that telephone customers were contributing over two thirds of the recovery of interstate loop costs with the SLC rate set at $3.50. 12 FCC Rcd. at 16,008 n.61.

LECs charged IXCs rates set by the FCC to recover both traffic-sensitive costs (like switching) and non-traffic sensitive loop costs on a per minute basis. The SLC was always a flat rate, which remained at $3.50 until the *CALLS Order.* The LECs charged the IXCs for carrier access services and consumers for subscriber access. These services have historically been treated as separate services by the FCC and were separately tariffed.

After passage of the 1996 Act, the FCC became convinced that non-traffic sensitive costs like the loop should only be recovered through non-traffic sensitive rates like the SLC. *Access Reform First Order,* 12 FCC Rcd. at 16,008. For this reason, in 1997 the Commission created a flat rate, the PICC, to be charged to IXCs to recover loop costs incurred by the LECs to carry traffic for the IXCs. *Id.* at 16,008. The FCC concluded that joint and common loop costs should be recovered through flat rate charges assessed on IXCs and consumers, both of whom cause loop costs. The FCC held that the PICC, the flat rate assessed on IXCs, was not a subsidy or a universal service mechanism, but rather "a flat-rated charge that recovers costs in a cost-causative manner." *Access Reform First Order*, 12 FCC Rcd. at 16,025.[5]

This regime did not last long, however. In July 1999, an *ad hoc* coalition of four of the five largest LECs and two of the three largest IXCs — known as the Coalition for Affordable Local and Long Distance Service — submitted a pro-

---

[5] The FCC theorized in the *Access Reform First Order* that loop costs are caused by subscribers and should be paid in full by subscribers. Nonetheless, the FCC declined to raise the primary residential SLC at for fear of impacting universal service. The Eighth Circuit affirmed this determination. *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998)

posal for an access charge scheme that would move the entire responsibility for loop cost recovery to consumers via the SLC. Under the CALLS proposal, PICCs would be abolished and SLCs increased over a five year period to more than make up for revenues the LECs formerly collected from IXCs via the PICC charge. The CALLS coalition argued to the FCC that its plan would resolve "thorny" issues regarding access charges and universal service by assuring that LECs would not be deprived of the revenues they formerly received in access charges which contributed to the recovery of their embedded loop costs.[6]

The FCC approved a modified CALLS proposal on May 31, 2000. The FCC eliminated the PICC rate as of July 1, 2000 and set a schedule for the SLC rate to increase from $3.50 to $6.50 by July 1, 2003; reduced switched access rates by $2.1 billion; called for a review of SLC rates prior to an increase above $5.00; established a $650 million interstate access universal service fund to be assessed directly on consumers; accepted a promise from the IXCs that they would pass on their savings to consumers in lower rates;[7] eliminated certain minimum fees from some long-distance carri-

---

[6] Over the five-year period, LECs will actually collect more in revenue then they would have if the PICC/SLC regime had remained. LEC revenues will actually be higher per year at the end of the plan. *CALLS Order* ¶ 41 (App. 52a-53a). Raising the SLC cap to $6.50 will enable the ILECs to recover 100% of their loop costs from consumers. *CALLS Order* ¶¶ 79, 86 (App. 60a-61a, 66a-67a). Average loop costs were estimated to be $6.10 per line in 1997. *Access Reform, First Order*, 12 FCC Rcd. at 16,011 n.78.

[7] Despite this promise, AT&T immediately raised its basic rates. *See* FCC Press Statement of Commissioner Gloria Tristani (June 23, 2000). Although it subsequently modified its increases, AT&T's basic rates are currently much higher than they were on June 29, 2000.

ers' basic rate plans;[8] adopted protections from the SLC rate increases for low-income customers; and made corresponding adjustments to the FCC's "price cap" regulations for the four LECs.

This plan was strongly opposed by many consumer groups. NASUCA and others[9] asserted that shifting full loop cost recovery to consumers by increasing the SLC would violate § 254(k). In sum, these parties maintained that — as the FCC has confirmed on many occasions — the loop is a "joint and common" facility for purposes of 254(k), and therefore that allocating all loop cost recovery to end users via the SLC violated the 1996 Act's command that no universal service may "bear ... than a reasonable share of the joint and common costs of facilities used to provide" the service.

In applying § 254(k), NASUCA pointed out that the FCC's own definition of universal services includes only services provided to consumers. Interstate access, which is a supported universal service, is the service that permits consumers to gain access to a long distance provider for the purpose of using the long-distance provider to send or receive a long-distance call. 47 C.F.R. § 54.101. Customer interexchange access does not include usage.

---

[8] These fees have reappeared for most of the plans offered by the long-distance companies as well as additional fees, like a charge for not receiving a separate bill.

[9] Others who raised the same argument at the FCC included the public utility commissions of Washington, California, Michigan, Montana and Wisconsin; the Consumer Federation of America; Consumers Union; The Texas Office of Public Utilities Counsel; state members of the Federal-State Joint Board on Universal Service; and others. *CALLS Order* ¶ 90 n.159 (App. 71a).

NASUCA also argued that the plain language of § 254(k) required the FCC to allocate joint and common loop costs among the services it regulated, as opposed to simply engaging in the process of jurisdictionally separating intrastate from interstate loop costs. NASUCA suggested that the phrase, "[t]he Commission, with respect to interstate services ... shall establish any necessary cost allocation rules" for joint and common costs, meant that the FCC had to establish rules to allocate loop costs between supported services, like customer interexchange access, and non-supported services, like carrier access. These allocations were necessary to prevent the establishment of rates for universal services that included the recovery of more than a "reasonable share" of loop costs. NASUCA maintained that establishing a SLC rate to recover 100% of joint and common loop costs and removing all loop cost responsibility from access rates charged to IXCs would necessarily result in an unreasonable share of loop costs being allocated to a universal service, customer interstate access.

The FCC rejected these arguments, concluding that § 254(k) was not relevant because it viewed the SLC as a method of "recovering" loop costs, not an "allocation" of those costs. For this rationale, the FCC relied on *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 559 (8th Cir. 1998), which had affirmed the Commission's prior *Access Reform First Order*. The FCC further reasoned that § 254(k) did not govern whether prices should be set through SLCs alone or through a combination of SLCs and PICCs because the customer "causes" all loop costs by subscribing to telephone service. The FCC therefore held that because loop costs were properly allocated between the interstate and intrastate jurisdictions, it could set rates to recover interstate loop costs without regard to the second sentence of § 254(k).

On appeal, the United States Court of Appeals for the Fifth Circuit accepted the reasoning of the Eighth Circuit in *Southwestern Bell* and rejected NASUCA's interpretation of § 254(k). *Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001) (App. 1a-27a).[10] The court of appeals' analysis of the § 254(k) issue largely consisted of one paragraph. The court quoted *Southwestern Bell's* statement that "because the SLC is a method of recovering loop costs, not an allocation of those costs between supported and unsupported services, § 254(k) is not implicated." 265 F.3d at 324 (App. 15a). The court held that § 254(k) concerns allocation of joint and common costs, while the SLC and the PICC involve the recovery of such costs. The court reasoned that cost recovery involves how and from whom the funds are collected, while cost allocation relates to "how the costs are disbursed." *Id.* (App. 15a). The court of appeals did not discuss any of the other grounds relied on by the FCC in its *CALLS Order* or advanced by the FCC on appeal.

Jurisdiction in the court of appeals was based on the authority of the court to review final orders of the FCC under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

---

[10] The court of appeals reversed the *CALLS Order* in part and remanded to the FCC for further explanation of the amount of the interstate access universal service fund (the $650 million) and the basis for the FCC's continued use of a 6.5% productivity factor to reduce certain rates in light of the D.C. Circuit Court's reversal of the FCC's use of this same 6.5% productivity factor in *United States Tel. Assn. v. FCC*, 188 F.3d 521 (D.C. Cir. 1999). Petitioner does not seek *certiorari* with respect to these portions of the court of appeals' decision.

## SUMMARY OF ARGUMENT

The court of appeals' decision warrants this Court's review because it renders § 254(k) superfluous and ignores the plain meaning of the statutory requirement that the FCC and state commissions may not impose more than a "reasonable share" of "joint and common costs" on any "universal service." Without review by this Court, the CALLS coalition LECs, and eventually all local telephone companies, will be able to force consumers to pay in their basic telephone rates the full cost of the loop facilities used to provide many non-universal services, such as broadband access, long-distance and teleconferencing.

This Court has already decided and accepted *certiorari* on several cases raising competitive issues arising from the Telecommunications Act of 1996.[11] This case presents an even more important issue of consumer rights that has not been encompassed in any of the many other 1996 Act cases decided to date by the federal courts. Congress clearly desired in the 1996 Act to preserve and enhance universal service. By allocating all local loop costs to subscriber access — in other words, by requiring that basic local telephone users pay all the costs of the joint and common facilities used by nearly all telecommunications services — the FCC and the court of appeals have misapplied basic principles of public utility ratemaking to justify a result that threatens the core concept of universal service codified by Congress in 1996.

Thus, at stake in this case is not only the integrity of the 1996 Act, but its central purpose of preserving universal

---

[11] *Iowa Utils. Bd. v. FCC*, 525 U.S. 366 (1999); *Verizon Communications, Inc. v. FCC, cert. granted*, __ U.S. __, 121 S. Ct. 2548 (2001) (argued Oct. 10, 2001).

telephone service for all Americans. If rates for consumers must alone recover all the costs of the loop, Congress's goal of affordable universal service is necessarily thwarted. Unlike the prior 1996 Act cases this Court has reviewed, the statutory provision in this case is not a "model of ambiguity,"[12] but instead a plain and straight-forward rule protecting basic telephone services from being saddled with an unreasonable portion of the shared costs that, as Congress specified, should also fairly be borne by other services sharing the local loop.

Finally, this Court's review is appropriate because § 254(k) by its terms applies both to the FCC and state public service commissions. Many if not most state commissions have already interpreted § 254(k), consistent with Petitioner's arguments here, to require that loop costs be allocated among customer and carrier access services. Because the 1996 Act continues the Communications Act's structure of dual federal/state jurisdiction over telephone regulation, a decision by this Court is needed to avoid a continuing conflict in application of the § 254(k) "reasonable share" standard between federal and state regulatory agencies.

## REASONS FOR ISSUING THE WRIT

This petition presents an important question of federal law not yet decided by this Court. The proper interpretation of § 254(k) will have a profound impact on the way telecommunications rates are set and costs are recovered from residential consumers for both interstate (federally regulated) and intrastate (state regulated) services. For the four CALLS coalition LECs alone, the federal subscriber line charge recovered approximately $12.5 billion in 2000. Consumers

---

[12] *Iowa Utils. Bd.*, 525 U.S. at 397.

paid these companies an additional $56.1 billion for basic local telephone services.[13] Thus, the allocation and recovery of loop costs under § 254(k) represents a substantial portion of the costs of the public switched telephone network, and thus the costs paid by consumers, and appropriately also carriers, to the LECs for use of those facilities.[14]

## I. THE DECISION BELOW CONTRADICTS THE PLAIN MEANING OF § 254(k)

The court of appeals' judgment is a highly troubling departure from settled canons of judicial statutory construction. Section 254(k) expressly requires the FCC to ensure that basic local service bears only a "reasonable share" of network costs, precluding the court of appeals from affirming the agency's decision in the *CALLS Order* to include all loop costs in subscriber line charges.

### A. The Court of Appeals Was Obligated to Implement the Clear "Reasonable Share" Language of § 254(k)

The foundational tenet of legislative interpretation is that, where clear and unambiguous, a statute's language must be given full effect by the courts. As the Court first stated under Chief Justice Marshall, "[t]he intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction."

---

[13] FCC Basic Financial Data Report for 2000 (all RBOCs).

[14] The court of appeals' interpretation will also inflate the federal universal service fund requirement. The establishment of a new $650 million fund in the *CALLS Order* itself is proof of that fact. If IXC rates continued to pay for a portion of loop costs, this fund would be unnecessary.

*United States v. Wiltberger*, 18 U.S. 76, 95-96 (1820).[15] Similarly, upon reviewing administrative agency action, courts are not "at liberty" to indulge in policy considerations, but rather must "decid[e] the naked question of law whether the [agency] is now, in this case, acting within the terms of the statute." *Packard Motor Car Co. v. Nat'l Labor Relations Bd.*, 330 U.S. 488, 493 (1947). Agency decisions that contravene a clear statute are to be reversed, with no deference accorded.[16]

These canons of statutory construction have developed into the familiar two-part *Chevron* framework for review of agency decisions. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). As the court of appeals impliedly conceded, this is a "Chevron I" plain meaning case. 265 F.3d at 323-24 (App. 15a).[17] Instead of taking the "reasonable share" language of § 254(k) head on, the court of appeals made — more accurately borrowed from the

---

[15] In the face of a clear statute, "the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). *See United States v. Sullivan*, 332 U.S. 689, 693 (1948) (courts must enforce criminal statutes even where they depart from prior legislation).

[16] Resort to legislative "intent" is also disfavored, for, as Justice Scalia has pointed out, "[a]lthough it is true that the Court in recent times has expressed approval of this doctrine, that is to my mind an ill-advised deviation from the venerable principle that if the language of a statute is clear, that language must be given effect[.]" *INS v. Cardoza-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J., concurring).

[17] The *Chevron* framework requires that "if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843-44. This "Chevron I" inquiry carries the day unless the court finds that the statute "is silent or ambiguous," in which event the court may enter into a deferential analysis of whether the agency's rule "is based on a permissible construction of the statute" under "Chevron II." *Id.* at 844.

Eighth Circuit — the determination that this provision does not speak to loop cost recovery, but rather cost allocation. *Id.* (App. 15a).

Leaving aside for the moment the validity of this purported distinction, *see* Section I.B, *infra*, it is evident that the court operated from a premise that the language of § 254(k) is clear on its face. Unlike its decision on other issues not encompassed in the present petition, the court of appeals did not find any ambiguity in § 254(k) that justified Chevron I deference to the agency. *See* 265 F.3d at 323-34 (App. 15a). Nonetheless, the court's decision does not at all grapple with the reality that a "reasonable share" of loop costs simply cannot mean all costs, or with the corresponding legal issue of whether IXC access to the loop is a "universal service" for purposes of the 1996 Act.

What the court of appeals did do was accept the FCC's policy arguments, namely that "as a practical matter, [NASUCA's] fears of anti-consumer effects are exaggerated" because the gross increase in the end user SLC is no higher than the inflated charges imposed under the former access charge regime. 265 F.3d at 324 n.5 (App. 15a). This theory can have no place in the review of agency implementation of an admittedly clear statute. *Packard Motor*, 330 U.S. at 493. Nor are the court's theories of cost "allocation" permissible, because as discussed below Congress is presumed to have known the accepted regulatory meaning of these terms, as consistently used by the FCC prior to the 1996 Act.

### B. The Court of Appeals' Interpretation of Cost "Allocation" Contradicts The Settled Treatment of Cost Allocation and Recovery In Telecom-munications Regulation

The plain language of § 254(k) ought to prevent the "allocation" of all loop costs to the SLC, a charge paid exclu-

sively by subscribers of basic local exchange services. As part of the 1996 Act's universal service provisions, § 254(k) was designed to ensure that consumers who buy basic voice-grade services would not be required to subsidize for more sophisticated consumers who use underpriced data services provided over the telephone loop or long-distance services priced below their true cost. The interpretation given to § 254(k) by the court of appeals fosters that result because under the *CALLS Order,* basic service voice customers pay for 100% of the cost of a facility, the local loop, which is an essential ingredient in every other product sold to consumers by telephone companies, including long-distance services sold by IXCs.

The FCC's rationale is that the cost of carrier access is only variable or marginal cost and should not include any contribution toward the fixed costs of the network, *i.e.*, the loop. This theory is inconsistent with settled concepts of regulatory pricing. For example, the rates set by state commissions in the electric industry are also based on cost allocation principles. Common plant, such as generation transmission and distribution plant, is allocated to various services based on formulas. Rates are then set to recover these allocated common costs from the services provided to various customer groups such as commercial, industrial and residential customers. C. PHILLIPS, THE REGULATION OF PUBLIC UTILITIES 255, 434-38, 459-461, 503 (3rd ed. 1993); J. BONBRIGHT, PRINCIPLES OF PUBLIC UTILITY RATES 109-10, 115-19, 378-86, 480-81, 480 (2d ed. 1988).[18]

---

[18] The FCC's theory is also in conflict with the economics of unregulated industries, where companies rarely price their products at marginal cost. If they priced all of their products that way they would not be able to recovery their total costs, which include common costs, such as buildings where more than one product is made or facilities used to make

*footnote continued on next page*

In light of this traditional regulatory treatment of cost allocation, § 254(k) ensures that supported universal services are not required to contribute more than a reasonable amount to cost recovery for facilities like the local loop because, if they were, the size of the universal service fund would be too large, and its proceeds would be used to pay for the contribution to joint and common costs which other, non-supported services ought to be paying. The proper application of § 254(k) requires that competitive (*i.e.*, non-universal service supported) telephone services be allocated some of the cost of the local loop. In the instance of IXCs, the terms of § 254(k) thus require the FCC to include in the rates paid by an interexchange carrier to a LEC some reasonable contribution toward joint and common loop costs. *Mutatis mutandis*, § 254(k) compels the conclusion that the FCC's rules must ensure that no "[customer interstate access service] bears no more than a reasonable share of [costs of the local loop] used to provide [that service]."

This result is entirely consistent with the position previously adopted by the FCC, for instance in its *Universal Service Order*.[19] There, the FCC specifically "emphasize[d] that universal service support will be available for access to interexchange service, but not for interexchange as toll service." 12 FCC Rcd. at 8,819. Long distance usage, the service provided by IXCs, is therefore not entitled to universal

---

more than one product. In the free market, customer demand and the value customers place on one product versus another are what determine how much prices can be marked up over marginal cost to contribute to the recovery of common costs.

[19] *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8,766 (1997), *aff'd in pertinent part, Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. granted*, 120 S. Ct. 2214, *cert dismissed*, 121 S. Ct. 423 (2000).

service support. By relieving IXCs of any cost responsibility for the loop, the FCC has moved this cost burden from an unprotected service, long distance usage, to a protected universal service, customer access to long distance.

Consequently, what the court of appeals, the FCC and the Eighth Circuit in *Southwestern Bell v. FCC* have all ignored is that by choosing what parties pay (a cost "recovery" decision), they have by definition imposed a cost "allocation" among the services those parties use. This is exactly the opposite result contemplated by § 254(k). In other words, only by "allocating" costs among services can the FCC determine which costs should be "recovered" by which services. Where a regulatory agency decides to recover certain costs from a particular class of customers, it has allocated those costs to that customer class. Contrary to the court of appeals' reasoning below, there is no difference in regulatory ratemaking between cost allocation and cost recovery. The SLC is indeed a "method of recovering" costs, 265 F.3d at 324 (App. 15a), but shifting costs from another charge to the SLC is a regulatory allocation of those costs.

The unreasoned reliance by the court of appeals below on the Eighth Circuit's decision in *Southwestern Bell* means that no federal court has given the FCC's interpretation of § 254(k) the rigorous scrutiny it deserves. As a result, like an urban legend, the agency's interpretation is gaining an aura of truth, to the tremendous detriment of residential telephone customers.

The court's analysis in *Southwestern Bell* rests partly on an acceptance of the FCC's position that by simply requesting telephone service, the subscriber "causes" loop costs, whether the subscriber uses the loop for local or interstate calls. 153 F.3d at 558. This statement, however, is irrelevant in interpreting § 254(k). Congress knew when it

enacted the 1996 Act that the FCC's position was that the telephone subscriber causes all loop costs. In fact, that agency opinion was upheld years before the 1996 Act in *National Ass'n of Regulatory Util. Comm'rs, v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985). Nevertheless, in adopting § 254(k), Congress did not carve out an exception for any "joint and common facilities used to provide [universal] service" if those costs are, in fact, "caused" by a subscriber.

Section 254(k) focuses on services and facilities, not cost causation. Congress left it to the FCC to define universal services. When it did so, the agency included customer interstate access, the service at issue here. With respect to facilities, Congress is presumed to have known that the FCC has consistently regarded the local loop as a joint and common facility used to provide both supported and unsupported services. Therefore, there is no reason to believe that Congress intended the FCC to treat the loop any differently than it would treat any other "joint and common" cost.

The remaining analysis in *Southwestern Bell,* which formed the sole basis for the court of appeals' decision on § 254(k), is a non-sequitur. The entire discussion is as follows:

> Likewise without merit is Texas Counsel's argument that an increase in the SLC price cap violates the second sentence of § 254(k) by causing services included in the definition of universal service to bear more than a reasonable share of the joint and common costs of facilities used to provide those services. Section 254(k) separates telecommunications services into those that are supported by universal service, and those that

> are not. The statute empowers the FCC to establish rules to prevent LECs from over-allocating to supported services the costs of facilities that are used to provide services in both categories. Because the SLC is a method of recovering loop costs, not an allocation of those costs between supported and unsupported services, § 254(k) is not implicated.

153 F.3d at 559 (citations omitted).

Here the court recognized that the purpose of § 254(k) is to prevent LECs from overallocating the costs of facilities used to provide both supported and non-supported services, like the loop, to supported services. But the court appears to be unaware that, as this Court decided decades ago, allocation of joint and common costs in a regulated environment is a prerequisite to setting just and reasonable rates. *Smith v. Illinois Bell Tel Co.*, 282 U.S. 133 (1930). The whole purpose of preventing an overburdensome allocation of joint and common costs to a supported service is to prevent that service from becoming unaffordable. It is, therefore, precisely "[b]ecause the SCL is a method of recovering loop costs" that misallocation is what is sought to be prevented.

If allocation of joint and common costs did not affect the recovery of these costs, then § 254(k) would be useless in protecting consumers by keeping universal service affordable and ensuring that the universal service fund remains manageable. Raising the SLC to recover loop costs no longer recovered by the PICC from IXCs is a an "allocation" of loop costs away from IXCs and to consumers of universal service, exactly what § 254(k) was designed to prevent. By artificially differentiating cost allocation and cost recovery in

the context of the SLC, the court of appeals has rendered § 254(k) meaningless.

Though it is somewhat superfluous for purposes of discerning Congress's clear intent, the legislative history of § 254(k) directly reinforces this conclusion. Section 254(k) originated in the Senate as subsection (h) of section 253 of Senate Bill 652. CONFERENCE REPORT, JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, 104th Cong., 2d Sess. at 15 (1996). The Committee Report on S.652 discusses the predecessor, in an earlier version of S.652, of Section 253(h), which was then subsection (i) of Section 253. REPORT OF THE COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION ON S.652, TELECOMMUNICATIONS AND DEREGULATION ACT OF 1995, 104th Cong., 1st Sess. (1995). Subsection (i) contained the same federal and state cost allocation mandates to prevent universal service from bearing an unreasonable share of joint and common costs. The Report provides that competitive services should be allocated some loop costs and, indeed, could be allocated all fixed costs if necessary to preserve universal telephone service. The Report states:

> In general, joint and common costs should be allocated based on the demand each service places on the network. The share allocated to competitive services should thus be more than the incremental costs that such services not included in universal service impose on any jointly used facilities. In fact, the Joint Board, *the FCC and the States may decide that competitive services not included in universal service shall bear all of the fixed and nonincremental costs of facilities jointly used to provide non-competitive universal service and competitive services, if*

> *such allocation is necessary as a mechanism to preserve and advance universal service.* However, in implementing any such cost allocation mechanism, the FCC and the Joint Board shall seek to ensure that such allocation is explicit and applied in a competitively neutral manner.

REPORT OF THE COMMITTEE ON COMMERCE at 30.

Therefore, both the plain language of § 254(k) and the legislative history are contrary to the interpretation of the court of appeals and of the Eighth Circuit.

## II. THE COURT OF APPEALS' DECISION CREATES AN UNNECESSARY CONFLICT BETWEEN STATE AND FEDERAL AGENCY INTERPRETATIONS OF A STATUTE EQUALLY APPLICABLE TO BOTH JURISDICTIONS

The court of appeals' erroneous interpretation of § 254(k) will also confuse state commissions and state courts that must apply the statute in state ratemaking proceedings. State commission decisions both before and after the 1996 Act conflict directly with the interpretation of the FCC, the court of appeals below and the Eighth Circuit in *Southwestern Bell.* [20]

---

[20] Many states have dealt with the subject of loop cost allocation in cases relating to determining the costs of intrastate services. The same "cost causation" reasoning applied by the FCC in the *Calls Order* has been routinely rejected by the state commissions, which have held that the loop is a cost which is shared or common to all the instate services provided over it. That was the law in many states when Congress passed § 254(k). *See e.g., Colorado Office of Consumer Counsel v. PUC of Colorado,* 786 P.2d 1086, 1093-95 (Colo. 1990); *PUC of Texas v. AT&T Communications of the Southwest,* 777 S.W.2d 363 (Tex. 1989);

*footnote continued on next page*

The most extensive analysis of § 254(k) has been by the Indiana Utility Regulatory Commission in *Re Access Charge Reform and Universal Service Reform,* Cause No. 40785 (1998), Indiana LEXIS PUR 4th (slip op. Oct 28, 1998), *aff'd* 1999 WL 236863 (Ind. PURC 1999) (*Indiana 254(k) Order*). The *Indiana 254(k) Order* was part of a trilogy of decisions relating to application of the 1996 Act and state law to universal service and access charges. There, the Indiana Commission rejected GTE's (now Verizon) argument that the state agency was required to remove "implicit subsidies" from local rates under the 1996 Act in order to establish the proper size of the intrastate universal service fund.

The *CALLS Order* was based on the similar assumption that "implicit subsidies" exist in carrier access charges which must be removed. *CALLS Order* ¶¶ 3, 18 ("The SLC ... is subject to a cap that, particularly for residential customers, is often below the level that would enable the LEC to recover the entire interstate cost of the local loop.") (App.30a). In contrast, the Indiana Commission properly noted:

> [T]o the extent that GTE's arguments about "implicit subsidies" depend upon an allocation of "more than a reasonable share of joint and common costs" to "services included in the definition of universal

---

*Teleconnect v. Iowa State Commerce Comm,* 404 N.W. 2d 158, 164 (Iowa 1987); *Southwestern Bell Tel. Co. v. Arkansas PSC,* 946 S.W.2d 730, 732-33 (Ark. 1997); *US West Communications, Inc. v. Washington Utilities and Transportation Commission,* 949 P.2d 1337, 1342 (Wash. 1997); *In the Matter of the Filing of Southwestern Bell Telephone Company,* Public Service Commission of Missouri, 26 MO PSC (NS) 344, 381 (1983); *New England Telephone Generic Rate Structure Investigation, New Hampshire Public Utilities Commission,* DR 89010, 76 NH PUC 150,-166 (1991); *Re Investigation Into Non-traffic Sensitive Cost Recovery,* Docket No. 860984-TP, Order No. 18598, 89 PUR 4th 258, 265-66 (Fla. Pub. Svc. Comm'n 1987).

> service," then GTE's arguments are without merit, as such an allocation scheme is now prohibited by federal law, 47 U.S.C. § 254(k).

*Indiana 254(k) Order* at 17.

In discussing the second sentence of § 254(k), the Indiana Commission concluded that universal service encompassed "access to interexchange service," meaning allowing the customer to connect with a long-distance company, "but should not include carrier access." *Id.* at 19. This conflicts with the FCC's position in the *CALLS Order* that because "[i]nterexchange access is a supported service ... moving the recovery of loop costs associated with interexchange access service from the PICC to the SLC is not a change in the allocation between supported and unsupported service." *CALLS Order* ¶ 97 (App. 76a).

Moreover, unlike the *CALLS Order*, the Indiana Commission specifically rejected the proposition that cost causation should be dispositive of loop cost allocation, holding that loop costs are joint and common costs that must be allocated under § 254(k):

> [T]he issue of what costs are common and joint has been blurred by the argument of cost causation, *i.e.*, if one service causes a cost to be incurred and if other services require the same costs to be incurred, then only the "cost causing" service's cost structure should reflect the cost. However, it seems reasonable that if two or more services require the presence of a particular facility in order for each of the services to function, then this particular facility would seem to be common or joint to each of the services.

*Indiana 254(k) Order* at 25. Consequently, the state agency held that cost causation principles, and decisions allocating all loop costs to end users based on that approach, "are rendered obsolete by § 254(k) which prohibits such an allocation," *id.*, and likewise that "direct assignment of the loop costs to any one service would be a violation of the second sentence of § 254(k)." *Id.* at 27.

Other state commissions have interpreted § 254(k) in a similar fashion, conflicting with the FCC's *CALLS Order* interpretation and with the court of appeals' decision below.[21] For instance, in a series of cases beginning in 1995, the Washington Utilities and Transportation Commission (WUTC) has consistently held that the cost of the loop is a shared cost which should be recovered in the rates of all the services that use the loop. *Re Costing and Pricing of Unbundled Network Elements, Transport, and Termination* Docket

---

[21] *See Re Competitive Telecommunications Environment,* Docket No. 97R-177T, Decision No. 98-46, 1998 WL 983449, at *11 (Colo. Pub. Util. Comm'n 1998); *Re GTE North Incorporated,* Case No. U-11832, Michigan Public Service Commisison, Michigan, PUR 4th (Mich. Pub. Svc. Comm'n slip op. 2000) ("that the costs of the loop assigned to local exchange service must be reduced by the recovery of those costs through other revenue sources including, for example, loop costs already recovered in revenue from . . . state and interstate primary interexchange carrier charges (PICC), state and interstate carrier common line charges"; *Re US West Communications, Inc.*, Docket No. RPU-96-9, 1998WL 265370, at *22,*23 (Iowa Utils. Bd. 1998) (in calculating wholesale rates under the 96 Act the cost of the local loop allocated to local, intrastate toll, and intrastate access services); *Re Govern Open Access to Bottleneck Services,* R. 93-04-0031. 93-04-002, Decision 01-08-011 (Cal. Pub. Utils. Comm'n 2001) (acknowledging the requirement under Section 254(k) to allocate loop costs away from voice service to data services); *Re Standards and Safeguards For Competitive Services,* M-00940587, Pennsylvania Public Utility Commission, 1996 WL 944339 *65,*68, *69, *184; *Re US West Communications, Inc.*, 183 PUR 4th 382, 443-44 (Utah Pub. Svc. Comm'n 1997).

No. UT-003 013, Thirteenth Supplemental Order, 207 PUR 4th 379 (2001). The WUTC concluded that the loop is a joint and common cost of providing both voice and data services, and its costs, therefore, must be allocated. After passage of the 1996 Act, the WUTC specifically held in *In the Matter of Determining Costs for Universal Service,* Docket No. UT-980311(a), 1998, Wash. UTC LEXIS 443 (1998), that § 254(k) codified its requirement that joint and common loop costs must be allocated for cost recovery purposes to all services that use the loop:

> [A]ssignment of 100% of the loop to the exchange service is contrary to the § 254(k) statutory requirement that "services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." Assigning 100% of the cost of the loop to basic exchange service, as proposed by the ILECs, clearly fails the statutory requirement that "no more than a reasonable share" be recovered from supported services.

It is particularly important for this Court to resolve this conflict between the FCC's application of § 254(k) and the historical and current treatment by state commissions of the loop as a joint and common cost required to be allocated among all services. The Tenth Circuit in *Qwest Corp. v. FCC,* 258 F.3d 1191, 1203 (10th Cir. 2001), accurately characterized the symbiotic federal and state relationship in carrying out the 1996 Act's provisions on universal service, including § 254(k), writing that the statute "contemplates a partnership between the federal and state governments to

support universal service."[22] State commissions and federal courts should not be applying conflicting interpretations of the same federal law to the same telephone network facilities.[23]

State commissions are generally implementing § 254(k) by treating the loop as a common facility, the costs of which must be recovered from many services, including intrastate long-distance. State commissions are not raising local rates to pay for loop costs. The FCC has taken the opposite approach. One unfortunate result of this conflict could be a need for much higher interstate SLC rates than are necessary and the concomitant need for a huge federal universal fund to pay for loop costs. While on the state side, there will be reasonable estimates of the need for state universal service funds by state commissions, on the federal side IXCs will avoid making a contribution to LEC loop cost recovery and universal service assessments will be required to make up the difference.

---

[22] *See, e.g.*, 47 U.S.C. § 254(b)(5) ("There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service."); *id.* § 254(f) ("Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State."); *id.* § 254(k) (placing complementary duties on the FCC and the states "to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services").

[23] While many state commissions have addressed loop cost allocation issues, there appears to be only one reported state decision discussing § 254(k). An intermediate appellate court in Kansas held that the Kansas Corporation Commission violated § 254(k) by allocating loop costs entirely to basic service. *Citizens' Utility Ratepayer Bd. v. State Corp. Commission of the State of Kansas*, 943 P.2d 494, 507 (Kan. Ct. App. 1997), *rev'd in part on other grounds*, 956 P.2d 685 (Kan. 1998).

This conflict should be resolved by this Court. It is not sensible as a legal or policy matter for agencies implementing a single statutory provision to adopt diametrically opposite positions on a matter of substantial financial significance in telecommunications ratemaking. Indeed, it is possible that without this Court's intervention, state agencies may feel compelled to adopt the FCC's view because of the decisions by the court of appeals and by the Eighth Circuit in *Southwestern Bell.* Given the scheme of cooperative federalism employed by Congress in structuring the 1996 Act, that would be an untoward result that *certiorari* review by this Court is required to prevent

## CONCLUSION

For all these reasons, the writ of certiorari should be granted.

Respectfully submitted,

MICHAEL J. TRAVIESO*
MARYLAND PEOPLE'S COUNSEL
6 St. Paul Street, Suite 2102
Baltimore, MD 21201
(410) 767-8150

*Counsel for Petitioner*

GLENN B. MANISHIN
STEPHANIE A. JOYCE
Kelley, Drye & Warren
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

*Of Counsel*

*Counsel of Record

December 10, 2001